

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES C. CRISTINI,

Defendant-Appellant

UNPUBLISHED

April 3, 1998

No. 181585R

Oakland Circuit Court

LC Nos. 94-134253-FH, 94-
134254-FH

AFTER REMAND

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

MEMORANDUM.

On September 12, 1994, defendant pleaded guilty to two counts of drawing a check over \$200 without sufficient funds, MCL 750.131(3)(c); MSA 28.326(3)(c) and of being an habitual offender, second offense, MCL 769.10; MSA 28.2082. Defendant's plea was made pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). Based on its preliminary evaluation of the case, the trial court indicated that defendant's sentence would consist of time served. On October 17, 1994, the trial court sentenced defendant to one year in the Oakland County Jail with credit for 132 days served. Defendant filed an appeal as of right to this Court on December 19, 1994.

On appeal, defendant argued that his convictions must be vacated because he was denied an opportunity to withdraw his guilty plea pursuant to *Cobbs*, *supra* at 283. In an attempt to preserve the issue for appeal, defendant filed a motion to withdraw his plea in the trial court on September 9, 1996.¹ Because the record on appeal did not indicate whether the trial court actually held a hearing or ruled on defendant's motion to withdraw his plea, we remanded for a determination of defendant's motion and retained jurisdiction. On remand, the trial court acknowledged that its original sentence exceeded the sentence contemplated in the *Cobbs* agreement, but denied defendant's motion to withdraw his guilty plea. Instead, the trial court indicated that it would adhere to the *Cobbs* agreement and amended defendant's one-year sentence to 132 days, with credit for 132 days served. At this time, defendant had already served his entire one-year sentence.

* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal after remand, defendant again argues that his convictions must be vacated because he was denied an opportunity to withdraw his guilty plea. We disagree. Defendant is not entitled to the relief requested, because he failed to preserve the issue for appeal.

A defendant who pleads guilty or nolo contendere in reliance on a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. *Cobbs*, *supra* at 283. Here, the trial court's sentence of one year clearly exceeded its preliminary evaluation of a sentence to time served, which was 132 days. Although defendant asked the trial court at sentencing to "address" the issue of the *Cobbs* "violation," he never indicated at sentencing that he sought to withdraw his guilty plea. Thereafter, defendant failed to file a timely motion to withdraw his plea as is required by former MCR 6.311(A)(2), which was in effect at the time of defendant's convictions and claim of appeal.² By the time defendant moved to withdraw his guilty plea in the lower court, he had already served his entire one-year sentence. Because defendant failed to file a timely motion to withdraw his plea in the trial court, he is precluded from raising on appeal any claim that his plea was not understanding, voluntary, or accurate. See MCR 6.311(C); *People v Kaczorowski*, 190 Mich App 165, 172; 475 NW2d 861 (1991).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

¹ A copy of the motion was received by this Court on August 30, 1996.

² Former MCR 6.311(A)(2) provided, "If a claim of appeal has been filed, a motion to withdraw a plea may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1)." Here, defendant's motion to withdraw his plea filed pursuant to MCR 7.208(B) was untimely.